

February 21, 2006

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Federal Communications Commission  
Office of Secretary

**VIA COURIER**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
c/o Natek  
236 Massachusetts Avenue, N.E., Suite 110  
Washington, DC 20002

In re: *Closed Captioning and Video Description of Video Programming –  
Implementation of Section 305 of the Telecommunications Act of 1996 – Video  
Programming Accessibility*

CGB-CC-0002 – Opposition of Telecommunications for the Deaf and Hard of  
Hearing, Inc., National Association of the Deaf, The Deaf and Hard of Hearing  
Consumer Advocacy Network, and Hearing Loss Association of America to the  
Petition for Exemption from Closed Captioning Requirements Filed by Paul Ott  
Carruth and Carla Carruth Tigner

Dear Ms. Dortch:

Telecommunications for the Deaf and Hard of Hearing, Inc., National Association of the Deaf, The Deaf and Hard of Hearing Consumer Advocacy Network, and Hearing Loss Association of America hereby submit for filing in the above-captioned proceeding their opposition to the petition for exemption from the closed captioning requirements filed by Paul Ott Carruth and Carla Carruth Tigner.

An original and two (2) copies of this filing are enclosed. Please date-stamp the enclosed extra copy of this filing and return it in the self-addressed envelope provided. Should you have any questions concerning this matter, please do not hesitate to contact us.

Respectfully submitted,



Paul O. Gagnier  
Troy F. Tanner  
Brett P. Ferenchak

Their Counsel

Enclosure

SWIDLER BERLIN LLP

Marlene H. Dortch, Secretary

February 21, 2006

Page 2

cc: via e-mail:

Ms. Amelia Brown (CGAB)

Ms. Traci Randolph (CGAB)

Mr. Claude L. Stout (TDI)

Mr. Kelby N. Brick, Esq. (NAD)

Ms. Cheryl Heppner (DHHCAN)

Ms. Brenda Battat (HLAA)

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Closed Captioning and Video Description	)	
of Video Programming	)	
	)	CGB-CC-0002
Implementation of Section 305 of the	)	
Telecommunications Act of 1996 --	)	
	)	
Video Programming Accessibility	)	

**OPPOSITION OF TELECOMMUNICATIONS FOR THE DEAF AND HARD OF HEARING,  
INC., NATIONAL ASSOCIATION OF THE DEAF, DEAF AND HARD OF HEARING  
CONSUMER ADVOCACY NETWORK, AND HEARING LOSS ASSOCIATION OF AMERICA  
TO THE PETITION FOR EXEMPTION FROM CLOSED CAPTIONING REQUIREMENTS  
FILED BY PAUL OTT CARRUTH AND CARLA CARRUTH TIGNER**

Claude L. Stout, Executive Director  
Telecommunications For The Deaf &  
Hard of Hearing, Inc.  
8630 Fenton Street, Suite 604  
Silver Spring, MD 20910  
(301) 589-3006 (TTY)

Kelby N. Brick, Esq.  
Associate Executive Director  
National Association of the Deaf  
Law and Advocacy Center  
814 Thayer Avenue  
Silver Spring, MD 20910  
(301) 587-7730 (Voice and TTY)  
(301) 587-0234 (Facsimile)

Brenda Battat  
Senior Director of Policy and Development  
Hearing Loss Association of America  
7910 Woodmont Avenue, Suite 1200  
Bethesda, MD 20814  
(301) 657-2248 (Voice)  
(301) 657-2249 (TTY)  
(301) 913-9413 (Facsimile)

Paul O. Gagnier  
Troy F. Tanner  
Brett P. Ferencak  
Swidler Berlin LLP  
3000 K Street, NW, Suite 300  
Washington, D.C. 20007  
(202) 424-7500 (Telephone)  
(202) 424-7647 (Facsimile)

Cheryl Heppner  
Vice Chair  
Deaf and Hard of Hearing Consumer  
Advocacy Network  
3951 Pender Drive, Suite 130  
Fairfax, VA 22030  
(703) 352-9055 (Voice)  
(703) 352-9056 (TTY)  
(703) 352-9058 (Facsimile)

Dated: February 21, 2006

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**OPPOSITION TO THE PETITION FOR EXEMPTION FROM CLOSED  
CAPTIONING REQUIREMENTS FILED BY  
PAUL OTT CARRUTH AND CARLA CARRUTH TIGNER**

**I.     INTRODUCTION**

Telecommunications for the Deaf and Hard of Hearing, Inc., the National Association of the Deaf, the Deaf and Hard of Hearing Consumer Advocacy Network, and the Hearing Loss Association of America (together, "Commenters"), by their undersigned counsel, hereby submit their opposition to the petition for an exemption ("Petition") from the Commission's closed captioning requirements for the video program "Listen to the Eagle," filed by Paul Ott Carruth and Carla Carruth Tigner ("Petitioner"), the program's producer.

Telecommunications for the Deaf and Hard of Hearing, Inc. ("TDI") is a national advocacy organization that seeks to promote equal access in telecommunications and media for the 28 million Americans who are deaf, hard-of-hearing, late-deafened, or deaf-blind, so that they may enjoy the opportunities and benefits of the telecommunications revolution to which they are entitled. TDI believes that only by ensuring equal access for all Americans will society benefit from the myriad skills and talents of persons with disabilities.

Established in 1880, the National Association of the Deaf ("NAD") is the nation's oldest and largest nonprofit organization safeguarding the accessibility and civil rights of 28 million

deaf and hard of hearing Americans across a broad range of areas including education, employment, health care, and telecommunications. Primary areas of focus include grassroots advocacy and empowerment, policy development and research, legal assistance, captioned media, information and publications, and youth leadership.

The Deaf and Hard of Hearing Consumer Advocacy Network (“DHHCAN”), established in 1993, serves as the national coalition of organizations<sup>1</sup> representing the interests of deaf and/or hard of hearing citizens in public policy and legislative issues relating to rights, quality of life, equal access, and self-representation. DHHCAN also provides a forum for proactive discussion on issues of importance and movement toward universal, barrier-free access with emphasis on quality, certification, and standards.

The Hearing Loss Association of America (“HLAA”) is the nation's foremost consumer organization representing people with hearing loss. HLAA's national support network includes an office in the Washington D.C. area, 13 state organizations, and 250 local chapters. HLAA's mission is to open the world of communication to people with hearing loss through information, education, advocacy, and support. HLAA provides cutting edge information to consumers, professionals and family members through their website, [www.hearingloss.org](http://www.hearingloss.org), their award – winning publication, *Hearing Loss*, and hearing accessible national and regional conventions. HLAA impacts accessibility, public policy, research, public awareness, and service delivery related to hearing loss on a national and global level.

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<sup>1</sup> The member organizations of DHHCAN include the American Association of the Deaf-Blind (AADB), the American Deafness and Rehabilitation Association (ADARA), the Association of Late-Deafened Adults (ALDA), the American Society for Deaf Children (ASDC), the Conference of Educational Administrators of Schools and Programs for the Deaf (CEASD), Communication Service for the Deaf (CSD), Deaf Seniors of America (DSA), Gallaudet University, Gallaudet University Alumni Association (GUAA), National Association of the Deaf (NAD), National Black Deaf Advocates (NBDA), National Catholic Office of the Deaf (NCOD), Registry of Interpreters for the Deaf (RID), Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), USA Deaf Sports Federation (USADSF), and The Caption Center/WGBH.

Commenters fully support the creation of programming to address the diversity of interests and views of the American public, including hunting and fishing programs. Commenters respectfully submit, however, that the Petition does not meet the statutory requirements necessary to support an exemption from the closed captioning rules or Petitioner's contention that compliance with the closed captioning requirements would impose an undue burden.<sup>2</sup> As set forth below, Petitioner has provided insufficient information to establish that the legal standard for granting the Petition has been met. Commenters therefore respectfully oppose grant of the Petition.

## **II. THE LEGAL STANDARD FOR GRANTING A PETITION FOR EXEMPTION**

Section 713 of the Communications Act of 1934, as amended, generally requires that video programming be closed captioned, regardless of distribution technologies, to ensure that it is accessible to persons with hearing disabilities.<sup>3</sup> The Commission has the authority to grant a petition for an exemption from the closed captioning requirements upon a showing that the requirements would impose an undue burden on the video programming provider or video owner.<sup>4</sup> Congress defined "undue burden" to mean "significant difficulty or expense."<sup>5</sup>

A petition seeking a waiver of the captioning rules must demonstrate that compliance would result in an undue burden within the meaning of Section 713(e) and Section 79.1(f) of the Commission's rules.<sup>6</sup> Section 713 requires the Commission to consider four factors when determining whether the closed captioning requirements will impose an undue burden: (1) the nature and cost of the closed captions for the programming; (2) the impact on the operation of

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<sup>2/</sup> 47 U.S.C. § 613(e).

<sup>3/</sup> *Id.*

<sup>4/</sup> *Id.*

<sup>5/</sup> *Id.*

<sup>6/</sup> 47 U.S.C. § 613(e); 47 C.F.R. § 79.1(f).

the provider or program owner; (3) the financial resources of the provider or program owner; and (4) the type of operations of the provider or program owner.<sup>7</sup>

Section 79.1(f) of the Commission's rules sets forth the Commission's procedures for seeking an exemption from the closed captioning requirements on the basis that compliance would impose an undue burden.<sup>8</sup> A petition for an exemption from the closed captioning requirements must be supported by sufficient evidence to demonstrate that compliance with the requirements would cause an undue burden.<sup>9</sup> Such petition must contain a detailed, full showing, supported by affidavit, of any facts or considerations relied on by the petitioner.<sup>10</sup> It must also describe any available alternatives that might constitute a reasonable substitute for the captioning requirements.<sup>11</sup>

**III. PETITIONER HAS PRESENTED INSUFFICIENT INFORMATION TO DEMONSTRATE THAT COMPLIANCE WITH THE CAPTIONING REQUIREMENT WOULD IMPOSE AN UNDUE BURDEN**

Petitioner requests an exemption from the closed captioning requirements for its video program "Listen to the Eagle," asserting that compliance would impose an undue burden on Petitioner.<sup>12</sup> In particular, the Petitioner argues that compliance would impose added costs that would make production unaffordable necessitating the cessation of production of the video program. As more fully discussed below, Commenters respectfully submit that the Petition is not supported by sufficient evidence to demonstrate that compliance with the closed captioning requirements would impose an undue burden upon Petitioner as required by the statutory factors

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<sup>7</sup>/ *Id.*

<sup>8</sup>/ 47 C.F.R. § 79.1(f).

<sup>9</sup>/ *Id.* § 79.1(f)(2).

<sup>10</sup>/ *Id.* § 79.1(f)(9).

<sup>11</sup>/ *Id.* § 79.1(f)(3).

<sup>12</sup>/ Petition at p.1.



set forth under Section 79.1(f)(2) of the Commission's rules.<sup>13</sup> The Petition therefore does not meet the legal standard for granting a request for exemption of the closed captioning rules.

First factor: The nature and cost of the closed captions. In judging the sufficiency of information filed to support a claim that the cost of implementing closed captioning will impose an undue burden, the Commission looks to whether the petitioner:

- (1) sought competitive pricing from multiple sources;
- (2) submitted copies of the correspondence received from such captioning companies, indicating a range of quotes;
- (3) provided details regarding its financial resources; and
- (4) sought any means to recoup the cost of closed captioning, such as through grants or sponsorships.<sup>14</sup>

Moreover, the Commission has determined that petitioners must make an effort to solicit captioning assistance from the distributors of its programming.<sup>15</sup> Failure to provide the foregoing information and to establish that the Petitioner pursued other possible means of gaining captioning hinders the Commission's assessment of the impact of the cost of captioning on Petitioner.<sup>16</sup>

Petitioner states that it does not have the technical capabilities to caption the video program (a non-scripted, live call-in show with video cutaways), and that Petitioner does not possess the financial means to cover the added captioning cost of approximately \$750 per thirty-

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<sup>13/</sup> 47 C.F.R. § 79.1(f)(2).

<sup>14/</sup> *Outland Sports, Inc., Video Programming Accessibility, Petition for Waiver of Closed Captioning Requirements*, 16 FCC Rcd 13605 (2001) ("*Outland Sports*") (advising that entities seeking a waiver of the captioning requirements seek cost quotes from multiple sources and provide correspondence evidencing the quotes obtained, provide detailed financial information, and discuss whether any efforts were made to recoup the cost of closed captioning). *See also The Wild Outdoors, Video Programming Accessibility, Petition for Waiver of Closed Captioning Requirements*, 16 FCC Rcd 13611 (2001) (reviewing sufficiency of information provided with respect to the four factors).

<sup>15/</sup> *Implementation of Section 305 of the Telecommunications Act of 1996 – Video Programming Accessibility*, 13 FCC Rcd 3272, 3366 (1997).

<sup>16/</sup> *Outland Sports*, ¶ 7.

minute episode for “pop up” captions.<sup>17</sup> Petitioner further states that fifty-two 30-minute television programs are produced each year and that captioning costs would amount to \$39,000 each year.<sup>18</sup> Elsewhere in the Petition, Petitioner states that captioning costs could amount to \$12,000 per year.<sup>19</sup> The discrepancy in the information provided does not allow the Commission to accurately consider the cost of captioning for the video program. In addition, Petitioner has not given any indication that efforts were made to seek competitive pricing from multiple captioning companies or, if it did, who those captioning companies or individuals may be. In sum, Petitioner has failed to demonstrate that it has sought competitive pricing from multiple sources.

Petitioner, moreover, did not provide sufficient information regarding the financial resources upon which it relies to produce its video program. Petitioner indicates that it receives support from four unnamed sponsors and provides a summary of its expenses, which indicates that the television show is currently operating at a deficit (at least in comparison to what has been budgeted for the show). However, Petitioner should provide additional details about its expenses, in particular, the total airtime costs and its production costs per episode as these costs relate to its overall operating expenses and budget.

The Petition also fails to indicate whether Petitioner sought any means to recoup the cost of captioning, such as through additional sponsorships or grants, or whether Petitioner solicited captioning assistance from the distributors of its programming, which include four ABC affiliates, three CBS affiliates and one WB affiliate. The Commission has determined that petitioners must make an effort to solicit such assistance and provide the distributor’s response to

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<sup>17/</sup> Petition at 1.

<sup>18/</sup> Petition at 1.

<sup>19/</sup> Petition at 3.

its solicitation.<sup>20</sup> Without such detailed information, the Commission cannot gain an understanding of the overall resources of Petitioner or make accurate findings regarding the cost of closed captioning. As a result, the Petition provides insufficient information for the Commission to assess the impact of adding captioning upon Petitioner's resources. Petitioner has therefore failed to provide sufficient evidence to support a claim for exemption under the first factor.

Second factor: The impact on the operation of the provider or program owner. The Petition provides very little information to describe the impact captioning would have on Petitioner's operations. Petitioner claims that Petitioner does not have the technical capabilities to provide captioning and that Petitioner "would be unable to provide and market Listen to the Eagle if they were required to provide for closed captioning."<sup>21</sup> Petitioner fails to provide any additional information to explain what alternatives to meeting the Commission's closed captioning rules have been considered, including what sources for closed captioning were considered. Given that such factual information has not been provided, Petitioner has not provided the Commission sufficient factual basis for assessing the impact of adding captioning upon Petitioner's operations. As a result, the Petition provides the Commission with insufficient basis for considering whether Petitioner's request for exemption finds support under the second factor.

Third factor: the financial resources of the provider or program owner. Commission Rule 79.1(f)(2) provides that a petition for exemption "must be supported by sufficient evidence to demonstrate that compliance with the requirements would cause an undue burden."<sup>22</sup>

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<sup>20</sup>/ See *Commonwealth Productions, Video Programming Accessibility, Petitioner for Waiver of Closed Captioning Requirements*, CSR 5992, Memorandum Opinion and Order, ¶ 3 (Mar. 26, 2004).

<sup>21</sup>/ Petition at p.1.

<sup>22</sup>/ 47 C.F.R. § 79.1(f)(2).

Additionally, in determining whether the closed captioning requirements impose an undue burden, the Commission must consider the resources that the petitioner has chosen to devote to the program in the context of the overall budget and revenues of the petitioner – and not merely the cost of captioning in relation to a particular program.<sup>23</sup> Here, Petitioner has failed to provide any such evidence, instead relying solely on unsubstantiated assertions regarding the high costs of captioning.

Commenters note that the Yearly Expense and Income Statement is limited to the “Listen to the Eagle” Televisions Show, but that Petitioner’s Radio show is “loaning” money to the video program so that it can continue to operate.<sup>24</sup> Clearly, Petitioners have other sources of financial support beyond that of the unnamed sponsors of the video program. But, Petitioner provides no information about its overall financial budget.

Commenters also note that the Petition does not address the extent to which Petitioner’s financial resources include revenue earned from the sale of various merchandise available on its website [www.listentotheeagle.com](http://www.listentotheeagle.com). Further, no information is provided in the Petition about these sources of revenue or other sources of income to which Petitioner may have access. Given that Petitioner’s involvement in the sale of materials appears to be related to and/or support its video program, information regarding revenue derived from the sale of such materials is relevant to considering Petitioner’s request for exemption in the context of the overall budget and revenues of Petitioner. Such information would enhance the Commission’s understanding of the resources available to support captioning of “Listen to the Eagle.”

To the extent that Petitioner has submitted select financial information that pertains only to the resources that Petitioner devotes to the “Listen to the Eagle” program, the Commission

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<sup>23/</sup> *Implementation of Section 305 of the Telecommunications Act of 1996 – Video Programming Accessibility*, 13 FCC Rcd 3272, 3366 (1997) (“Report and Order”).

<sup>24/</sup> Petition at p. 2.

cannot gain an understanding of the overall budget and resources of Petitioner and, in turn, the impact of adding captioning upon those resources. Detailed information regarding Petitioner's overall financial resources is necessary in order to consider whether the request for exemption is warranted. Such information would enable the Commission to understand the resources available to support captioning of Petitioner's program.

Fourth factor: The type of operation of the provider or program owner. Petitioner provides insufficient information regarding the type of operations that it runs. In order for the Commission to determine whether the Petition is supported under the fourth factor, Petitioner should have provided detailed information regarding its operations and explained why or how complying with the closed captioning requirements would result in significant difficulty for Petitioner because of the type of operations involved. Petitioner fails to explain why the nature and/or specific attributes of its operations provides a basis to exempt it from the captioning rules. Lacking such information, the Petition fails to demonstrate that an exemption is warranted under the fourth factor.

#### **IV. CONCLUSION**

For those reasons, Petitioner's request for exemption from the closed captioning requirements is not supported by sufficient evidence to demonstrate that compliance with the requirements would cause an undue burden within the meaning of Section 713 of the Act.

WHEREFORE, for the foregoing reasons, Commenters respectfully oppose grant of the Petition.

Respectfully submitted,



Claude L. Stout  
Executive Director  
Telecommunications For The Deaf and  
Hard of Hearing, Inc.  
8630 Fenton Street, Suite 604  
Silver Spring, MD 20910  
(301) 589-3006 (TTY)

Kelby N. Brick, Esq.  
Director, Law and Advocacy  
National Association of the Deaf  
814 Thayer Avenue  
(301) 587-0234 (Facsimile)  
(301) 587-7730 (Voice and TTY)  
(301) 587-0234 (Facsimile)

Brenda Battat  
Associate Executive Director  
Hearing Loss Association of  
America  
7910 Woodmont Avenue, Suite 1200  
Bethesda, MD 20814  
(301) 657-2248 (Voice)  
(301) 657-2249 (TTY)  
(301) 913-9413 (Facsimile)

Paul O. Gagnier  
Troy F. Tanner  
Brett P. Ferencak  
Swidler Berlin LLP  
3000 K Street, NW, Suite 300  
Washington, D.C. 20007  
(202) 424-7500 (Telephone)  
(202) 424-7647 (Facsimile)

Cheryl Heppner  
Vice Chair  
Deaf and Hard of Hearing Consumer Advocacy  
Network  
3951 Pender Drive, Suite 130  
Fairfax, VA 22030  
(703) 352-9055 (Voice)  
(703) 352-9056 (TTY)  
(703) 352-9058 (Facsimile)

Dated: February 21, 2006

## CERTIFICATE OF SERVICE

I, Brett P. Ferenczak, do hereby certify that, on February 21, 2006, a copy of the foregoing Opposition of Telecommunications for the Deaf and Hard of Hearing, Inc., National Association of the Deaf, The Deaf and Hard of Hearing Consumer Advocacy Network, and The Hearing Loss Association of America to the Petition for Exemption from Closed Captioning Requirements Filed by Paul Ott Carruth and Carla Carruth Tigner, as filed with the Federal Communications Commission in CGB-CC-0002, was served by first class U.S. mail, postage prepaid, upon the Petitioner:

Paul Ott Carruth & Carla Carruth Tigner  
Box 219  
Summit, MS 39666

Brett P Ferenczak